



Neutral Citation Number: [2024] EWHC 1292 (Ch D)

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION**

Claim No: BL-2023-000606

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 28 May 2024

Before:

CLARE AMBROSE
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between:

CLEVELAND POTASH LIMITED

Applicant

and

**SECRETARY OF STATE FOR
BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**

Referee

and

(1) THE HONOURABLE MRS FERELITH DRUMMOND

(2) CLASSIC LODGES

(3) MRS JEAN MORALEE

Respondents

Morag Ellis KC and Emyr Jones (instructed by **Herbert Smith Freehills LLP**) for the Applicant
Richard Kimblin KC (instructed by Knights) for the First Respondent

Hearing dates: 30 April & 1 May 2024

A Introduction

1. This case is about the ownership and exploitation of four parcels of land in North Yorkshire situated very close to the North Sea coast between Saltburn and Whitby.
2. On 9 December 1946 the First Respondent’s father, the late Mr Mark Palmer conveyed three of these parcels subject to an exception and reservation (“the Reservation”) contained in conveyances of that land in the following terms.

“AND ALSO EXCEPT AND RESERVING to the Vendor and his successors in title the mines beds and quarries of ironstone and iron ore and other metals within and under the property with all necessary and proper powers rights and easements for searching for winning working getting in and carrying away the same whether by underground or surface workings including power to let down the surface whether built upon or not and full power to sink any pits or shafts or drive-drifts or to erect or construct any buildings engines machinery roads tramways waterworks waterways airways or other works or conveniences necessary or desirable for the purpose of getting working carrying away converting or disposing of such mines and minerals or for any purpose connected therewith and to stack and lay up any minerals and refuse which may be raised out of any such mines proper compensation being paid to the purchaser for all damage done by subsidence or otherwise to the surface or to the buildings thereon and for the occupation of the surface in or about the exercise of such rights and powers provided always that notwithstanding anything hereinbefore contained the reservation aforesaid shall not be taken to authorise the working of mines and minerals situate under or adjacent to any buildings now actually standing on the property which shall be necessary for the support of such buildings respectively and that the amount of any such compensation as aforesaid shall be settled by the arbitration of two arbitrators or their umpire pursuant to the provisions of the Arbitration Acts 1889 and 1934 or any statutory modification thereof.”

The fourth parcel was conveyed on the same terms on 16 January 1947.

3. This is the trial of a preliminary issue as to the effect of the Reservation and the wording “*the mines beds and quarries of ironstone and iron ore and other metals*”. In particular, the court is asked to address whether the Reservation means that the First Respondent now owns or has any interest in the existing mines, beds and quarries of potash and salt and related rights in these parcels of land (“the Parcels”) named as areas B, C, Q and V on a plan attached to the particulars of claim, involving in total around 350 acres.
4. The meaning of the Reservation matters because the Applicant owns and operates Boulby Mine in the same locality as the Parcels. Boulby Mine is described as the UK’s most important non-hydrocarbon mine. From around 1973 until 2018 the Applicant extracted potash and salt from the area (including the Parcels), and it owns the freehold of the Parcels. Since 2018 it has extracted a substance called polyhalite off-shore from land beneath the North Sea on this area of the coast. It no longer mines from the on-shore land but it needs to use the underground tunnels created on-shore (including tunnels under the parcels).
5. The Applicant’s primary position is that it owns the tunnels and the beds of potash and salt in the Parcels, because they do not fall within the Reservation, while the First Respondent says she owns them because her father reserved ownership under the Reservation (and she succeeded over his rights).
6. These proceedings were issued by way of Part 8 claim form on 21 April 2023 under which the Applicant is seeking a declaration of its rights over the Parcels. The Applicant made an application to the Secretary of State on 7 June 2022 seeking the compulsory grant of a lease under the Mines (Working Facilities and Support) Act 1966 over two separate pieces of land owned by the Second and Third Respondent (and seeking such leases over the Parcels if it is wrong on its construction of the Reservation). The Secretary of State referred that application to the High Court on 8 February 2023.

7. On 17 October 2023 Master Brightwell ordered the trial of a preliminary issue as to the construction of the Reservation and gave permission for the parties to adduce expert evidence from a mineral surveyor in relation to that issue.
8. The Secretary of State is named as referee in these proceedings but did not take part in the trial.

B The Issues

9. The central question before me is as to the meaning of the Reservation in the conveyances, and in particular the term “*the mines beds and quarries of ironstone and iron ore and other metals*” and as to whether potash and salt fall within the wording of the Reservation. There was no list of issues but the main issues that arose in answering that question can be described as follows:
 - a) What is the meaning of the term “other metals” in the vernacular of the mining world, the commercial world and landowners?
 - b) What were the relevant factual circumstances surrounding the making of the conveyances?
 - c) Were potash and rock salt known as commercially viable mineral resources in the UK when the conveyances were made? Why does such knowledge matter?
 - d) What assistance can be drawn from canons of construction such as *ejusdem generis* and construction *contra proferentem*?

C The Law

10. The conveyances in issue are legal documents for the transfer of ownership of the Parcels pursuant to contracts for the sale of land. On the law both sides accepted that the issue to be decided was a matter of contractual interpretation.
11. There was common ground that the basic principles of contractual interpretation to be applied are set out in *Investors in Industry v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 and *Wood v Capita Insurance* [2017] UKSC 24. A

useful summary of the principles is Lord Hodge’s statement in *Wood v Capita* [10-11]

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.....

*....Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense....”*

12. The relevant date for testing the parties’ objective intentions is when the contract is made. In the skeleton arguments this was put forward as the date of the grant, (i.e. the conveyances of December 1946/January 1947) but at the hearing the Applicant put forward the auction as the date of sale (i.e. 26 September 1946). It was not necessary to decide which (references to 1946 in this judgment relate to all these dates including 16 January 1947). However, the date of the conveyance was the more applicable date since this was the instrument in issue, and the date when the agreement was executed.
13. It was also common ground that the case of *Earl of Lonsdale v Attorney General* [1982] 1 WLR (“*Lonsdale*”) is relevant to assist in the interpretation of the Reservation. The case was about the construction of a reservation of “*mines and minerals*” which was a fairly common wording (also found in a number of statutes). The wording here is different but the approach remains useful, as shown by *Wynne-Finch v Natural Resources Body for Wales* [2021] EWCA Civ 1473 (“*Wynne-Finch*”). In *Lonsdale* Slade J provided an important survey of a great deal of case law on the construction of that wording spanning the 19th and the 20th centuries. These reservations (and disputes relating to them) were quite common when land was conveyed for the purpose of building canals and railways. Slade J provided a valuable summary at p924-925:

- (1) Though the wide sense given to the phrase “mines and minerals” by Lord Romilly M.R. in *Midland Railway Co. v. Checkley*, L.R. 4 Eq. 19 and by Mellish L.J. in *Hext v. Gill*, L.R. 7 Ch.App. 699 is a sense which the phrase is capable of bearing and can still be attributed to it in a proper context see, for example, *O’Callaghan v. Elliott* [1966] 1 Q.B. 601, it cannot now properly be regarded as a primary or literal sense which is always to be applied in the absence of a sufficiently clear contrary context: see, for example, the *Budhill case* [1910] A.C. 116 and *Waring v. Foden* [1932] 1 Ch 276 .
- (2) The phrase “mines and minerals” is not a definite term, but is one that is capable of bearing a wide variety of meanings: see, for example, the *Budhill case* [1910] A.C. 116 , 130 *per* Lord Gorell and the *Glenboig case* [1911] A.C. 290 , 299 *per* Lord Loreburn L.C. One possible meaning that had been attributed to the word “minerals” in *Darvill v. Roper*, 3 Drew. 294 and other pre-1880 authorities was “all such substances as are dug out of the earth by means of a mine.” This remains a possible meaning in a proper context.
- (3) Unless the meaning is clear from the four corners of the relevant instrument itself, the first duty of the court in construing a grant of mines and minerals is to try to ascertain what the phrase meant in the vernacular of “the mining world, the commercial world and landowners at the time of the grant,” in accordance with the test suggested by James L.J. in *Hext v. Gill*, L.R. 7 Ch.App. 699, 719 and approved by the House of Lords in the *Budhill case* [1910] A.C. 116 . The common link between the three categories of persons referred to by James L.J. is, I think, that they are all persons who may ordinarily be expected to have both some knowledge of mines and minerals and also some experience of dealing with them in the course of commerce in this country.
- (4) The meaning of the phrase in this vernacular sense may be derived either from direct evidence as to the vernacular meaning at the relevant time or by inference drawn by the court, as in *Barnard-Argue-Roths-Stearns Oil and Gas Co. Ltd. v. Farquharson* [1912] A.C. 864. If there is clear evidence as to the vernacular meaning at the date of the trial, then, in the absence of evidence to the contrary, the court may be justified in assuming that there was a similar vernacular usage at the date of the grant: see the *Glenboig case* [1911] A.C. 290, 299 *per* Lord Loreburn L.C.
- (5) Where it is clearly established that, at the date of the grant, a particular vernacular meaning was attributed to the phrase “mines and minerals” by “the mining world, the commercial world and landowners,” the court will be predisposed to adopt that meaning. The vernacular test, however, is not a rigid test to be applied without regard to all the other terms of the instrument in question and the circumstances in which it is used: see *Borys v. Canadian Pacific Railway Co.* [1953] A.C. 217, 223 *per* Lord Porter. The court must never overlook the commercial background and apparent commercial purpose of the transaction.
- (6) One pointer to the parties' intentions may be to consider whether or not the substances in question are exceptional in use, in value and in character: see for example *Waring v. Foden* [1932] 1 Ch. 276, 294 *per* Lawrence L.J.

Another pointer is the evidence as to the general state of knowledge of the relevant substance at the date of the grant and the way in which it was then regarded and treated as a commercial matter; see, for example, *Barnard v. Farquharson* [1912] A.C. 864, 869 *per* Lord Atkinson. A third, significant pointer may be derived from any express powers of working that are conferred by the instrument in question: see for example the same case at p. 869 *per* Lord Atkinson.

(7) In considering whether a grant or reservation of mines and minerals includes a specified substance, it is irrelevant that the parties did not actually have that substance in mind. The test of their intention is an objective one: see for example the *Reardon-Smith case* [1976] 1 W.L.R. 989, 996 *per* Lord Wilberforce.

14. There have been relatively few cases where the direct evidence is conclusive as to a vernacular usage or meaning (for example it was not found in *Darvill v Roper* [1855] 3 Drew 294 and *Wynne-Finch*. However, in the absence of direct evidence of the vernacular meaning, the court will go on to draw inferences as to that meaning. That exercise is comparable to the more recent authorities' explanation of ascertaining the objective meaning of the language in its wider context, as suggested in *Wood v Capita*, and both parties relied on that approach.

Knowledge of whether a mineral is a commercially viable resource

15. There was an issue as to the significance of vernacular understanding as to whether potash could be commercially extracted for the purpose of profit in 1946.
16. The First Respondent maintained that potash (and salt) was commercially extracted at the time and the parties would have been aware of this, even if it had not yet been mined in the UK. Her counsel relied on Slade J saying that it is irrelevant that the parties did not have the substance in mind, and accepting that a reservation of this type may apply even if the existence of the substance was unknown (*Lonsdale*, p905H).
17. The Applicant relied on Slade J's suggestion that a court must take account of the general state of knowledge of the relevant substance at the date of the grant and the way in which it was then regarded and treated as a commercial matter (p925C). It submitted that Slade J's principle (3) in *Lonsdale* refers to inferences drawn as to knowledge of dealing with the relevant minerals "in this country" so that

extraction of a mineral outside England would not be sufficient to establish relevant vernacular understanding of its commercial potential. More generally, it relied on Mrs Iwanicki's evidence that potash was not recognised as a commercially viable mineral in the UK in 1946, and not mined there to suggest that it was not covered.

18. On the first point I prefer the Respondent's position, namely that foreign exploitation of a mineral may be sufficient to give rise to a relevant vernacular understanding that a mineral can be commercially extracted. Slade J's reference to knowledge of dealing with the mineral "in this country" (in principle (3) of his summary set out above) was made for the purpose of identifying the relevant group that make up the mining, commercial and landowning world. The court is investigating the vernacular of the mining and commercial world in England rather than elsewhere. *Lonsdale* was dealing with the rights of the Crown, and many of the other authorities were dealing with the construction of legislation for compulsory purchase of land in England and Wales (or Scotland) so it was unsurprising that the term was being assessed against mining "in this country". However, this provided no basis to suggest that a reservation of this type cannot apply to a mineral unless it is recognised to be commercially viable to extract within the relevant jurisdiction. Indeed, the factual investigation in *Lonsdale* covered mining in many jurisdictions.
19. On the more general point, knowledge of whether a mineral can be commercially exploited at the relevant time will be relevant as to whether the parties would have bargained to reserve it. Slade J in *Lonsdale* (see p918F) suggested that if it would never have occurred to the parties to reserve the mineral in question then that mineral is unlikely to have been reserved. *Lonsdale* and *Wynne-Finch* shows that a reservation will not generally be construed as covering a material unless it is recognised at the time that it can be commercially extracted for the purpose of profit.
20. However, the recognised potential economic interest need not be immediate, local or significant. While this type of reservation may protect minerals known to exist

in commercially viable quantities, an equally important purpose may be to reserve rights over minerals where there is uncertainty as to their existence or future exploitation. The authorities show that this type of reservation is not generally entered into for the purpose of immediate commercial exploitation of minerals known to be present or potentially present. They are primarily designed to preserve mining rights where land is being purchased for other purposes such as farming or building a canal or railway. If the parties knew there were minerals that were worth extracting for commercial gain then they would be more likely to use different terms regulating exploitation in much greater detail (and indeed a sale might be surprising).

21. The Reservation of a mineral involves an allocation of risk where the parties will rarely know what minerals will be exploited in the future. A workable reservation does not necessarily require common knowledge that a mineral is worth extracting from the land in question, or the likely potential for such extraction, or even its existence. However, evidence of what the parties would objectively have understood will influence the conclusion as to what they were contracting for. This may include the expected purpose of a reservation, the type of working allowed and the intended economic exploitation.
22. As Slade J suggested, the parties' knowledge provides pointers but may not be decisive. The weight of the evidence will depend on the context, including the mineral and land in question and the working terms by which any mineral can be extracted.
23. Where a mineral has a low value and will be used locally then knowledge of local use and exploitation is likely to be relevant to decide whether its extraction would have occurred to the parties, and also the related questions as to whether it is extracted for the purpose of profit and whether its use is exceptional (as in *Wynne-Finch v National Resources Body for Wales* [2021] EWCA Civ 1473 and *Waring v Foden* [1932] 1 Ch 276). However, if the disputed substance is sought after and traded internationally then it may not be necessary to establish that it is

exceptional although knowledge of potential exploitation may be relevant in testing whether its extraction was bargained for (as in *Lonsdale*).

D Evidence

24. The Applicant instructed Mrs Jane Iwanicki who is a chartered mineral surveyor and holds the title of Crown Mineral Agent. She was asked to give her views on the meaning of the wording of the Reservation from a mineral perspective and whether the mining/commercial world would have regarded rock salt as a metal at that time. The First Respondent instructed Mr David Sandbrook who is also a chartered mineral surveyor.
25. Both experts gave helpful evidence. Mrs Iwanicki was an extremely knowledgeable expert. She provided a very helpful and impressive report on the relevant terrain, the mining and geological history and understanding of the substances and terms under consideration. She had a stronger grasp of the relevant mining and commercial world, and deeper knowledge of the area in question than Mr Sandbrook.
26. However, she was effectively asked to give her opinion on the construction of the conveyance. To a lesser degree Mr Sandbrook was also drawn to do this. Construction is a matter of law and this part of their evidence was of very limited relevance. It also meant that the oral evidence was less helpful than it might have been because, unsurprisingly, the experts tended to defend their opinion on the construction of the conveyances. *Lonsdale* justifies reliance on expert evidence on the vernacular usage or meaning of specific words or phrases. Expert evidence of history, geology, land use and matters of technical and market practice may also be required for the court to understand the factual matrix. However, *Lonsdale* does not justify having opinions from experts on the construction of conveyances. For similar reasons the evidence of views expressed by experts instructed in the proceedings issued in 1969 on the effect of the conveyances was of limited relevance.
27. The applicant served several witness statements setting out much of the factual background. These included two statements from Ms Iwanicki relating to factual

matters and statements served in relation to separate applications, much of which did not relate to the issue before me.

E Findings on substances that are present and have been mined

28. The Applicant rightly maintained that the preliminary issue is about the use of language. Before considering the disputed language and facts it is perhaps helpful to highlight substantial consensus between the parties on much of the language, meaning, content and categorisation applied to many of the substances relevant to the dispute. The findings below are drawn from the witness and expert evidence and reflect ordinary meanings rather than technically precise scientific definitions.
29. There was also much common ground as to what was present and mined. In brief, there have been two very different eras of mining in this area. First, there was extensive ironstone mining in the locality of the Parcels between around 1860 and 1934 because ironstone was used for producing iron. The mines were owned by businesses run by the First Respondent's family. Ironstone mining in the wider Cleveland area stopped completely in 1964. Ironstone was mined at around 40m depth.
30. The second era has been the Applicant's modern day mining in the same locality at very much greater depths (over 1000m below ground level) for evaporite minerals used for fertilisers, with rock salt as a by-product. The Applicant mined for potash (mainly sylvinite) and rock salt at such depths between 1973 and 2018. Since then the Applicant has been mining polyhalite off-shore in nearby areas under the seabed (at similar depth).
31. There was much agreement as to the substances under discussion.
 - a) Polyhalite is a naturally occurring mineral that contains hydrated sulphates of potassium, magnesium and calcium. It is mainly used as a fertiliser. As mentioned, it is currently mined by the Applicant off-shore from the Parcels. Mrs Iwanicki described it as the main potash resource now worked in the area.

- b) Evaporite minerals is a term covering a broad range of soluble salts that form from the evaporation of sea water. It covers polyhalite, salt (including rock salt), sodium sulphate (also called anhydrite which was found in Billingham, Teesside), gypsum (also called calcium sulphate) and the more common forms of potash.
- c) Potash is a generic term but it always contains the element potassium (K) and its main use is to make fertiliser. Historically potash was extracted from burning wood. In a modern commercial sense (and this understanding goes back more than 100 years and would have been the same in 1946) it covers naturally occurring rocks or minerals containing sufficient potassium bearing minerals to be of economic interest.
- d) Sylvine (also called sylvite) contains potassium chloride (KCl) and is a common form of potash.
- e) Sylvinite is another form of potash. It contains a mixture of halite (sodium chloride) and sylvine (potassium chloride). It was the main potash bearing rock worked by the Applicant on Boulby Mine between around 1973 and 2018.
- f) Rock salt (also referred to as halite) is sodium chloride (NaCl) that occurs in nature in a solid state. It was mined by the Applicant (including on the Parcels) as a by-product of the mining for potash. The order for the preliminary issue referred to salt which is a more generic term that would include brine (a solution of NaCl). The dispute is primarily about rock salt found naturally under the Parcels. Rock salt is found in Boulby in a stratum (or layer) below a layer of sylvinite. The rock salt stratum is thicker and more stable than the sylvinite and the arterial roads and tunnels of the onshore mine were driven through the rock salt, with access then being gained to mine the sylvinite above.
- g) Iron ore is used to describe rocks and minerals from which the metal iron can be economically extracted (most commonly by processing and smelting in a blast furnace).

- h) Ironstone is a sedimentary rock that is rich in iron. It is an iron ore. It was extensively mined for many years (between around 1860-1934) by the First Respondent's family in the Boulby Mine and locally.
32. There was much debate as to the meaning of the word "metals" in the Reservation. However, there was no dispute as to some aspects of the meaning of that term and its application. The experts agreed that iron (Fe), sodium (Na) and potassium (K) are metals, and they are also described as metallic elements. Both experts used the chemical symbols (i.e. letters such as Fe) commonly used for them.
33. Iron is a metal in very common use with metallic qualities such as lustre, hardness, an ability to conduct heat and electricity, and ductility. However, in the context of mining, iron is not found in economic quantities in nature in what Mrs Iwanicki described as its metallic or native state. This state was also sometimes described as the elemental, natural or pure or near pure form of the metal (generally referred to hereafter as a native state). An example of a metal in its native state would be a new iron nail.
34. More generally, metals in their native state are not found in nature in economic quantities other than precious metals such as gold and silver.
35. Sodium and potassium are highly reactive with air and water, and are not ordinarily found in their native state other than for laboratory use. They can be isolated in their native state from compounds such as NaCl or KCl through electrolysis.
36. The experts did not attempt to identify a definition of metallic qualities but it was acknowledged that potassium and sodium lack some of those qualities since they are reactive. Both experts' evidence was that the metallic element potassium (K) is an essential constituent of plant and animal life.

F The parties' positions on construction of the Reservation

F.1 The Respondent's case

37. The Respondent's case was that the Reservation must be construed against the whole wording and taken in the overall context of the conveyance. The obvious

purpose of the reservation was to retain the vendor's interest in the future value of mining minerals on the land, because it used broad language and interchangeable references to "mines", "mines and minerals" and "any minerals".

38. In 1946 potash would have been regarded as a mineral of exceptional use and value for commercial exploitation because the presence of potassium makes it a good fertiliser.
39. The mining, commercial and landowner world would have understood the reference to "other metals" in the Reservation as a reference to minerals which yield a metal of some utility. That would include potassium by reason of its uses in industry and agriculture, and the very considerable quantities which the market required.
40. The First Respondent also relied on Mr Sandbrook's view that people in the mining and commercial world and landowners would have regarded natural sources of potassium and sodium as metals. The evaporite minerals are regarded as metallic salts. As potassium is a metal, natural sources of that metal such as sylvinite were commercially extractable and of exceptional use as a fertiliser, and would be considered within "metals" within the vernacular of the mining, commercial and landowning worlds. The Reservation for "other metals" should be read as "other sources of metal".
41. The First Respondent also relied on the remarks in the auction particulars and the fact that the Reservation was very comprehensive as to the facilities for mining which were reserved (it included both underground and open mining, quarrying, and roadways). The Reservation was not limited to substances that the parties would actually or objectively have had in mind at the time of the conveyance, but also reflected their intention to secure the vendor's position as to future exploitation of the land.

F.2 The Applicant's case

42. The Applicant's case was that the Reservation was not effective to reserve ownership of potash and rock salt. It acknowledged that the term "other metals" gave the Reservation broader effect than reserving ironstone and iron ore.

43. The Applicant also accepted that “other metals” had a wider meaning than metals in their native state. This was a sensible (and necessary) approach since “other metals” could not meaningfully be construed in this context as referring to metals in their native state as this would give the words no practical effect (and made little sense taken alongside the reservation for ironstone and iron ore). The only metals found in economic quantities in a native state are precious metals and, as Mrs Iwanicki commented, these would generally be categorised separately at a commercial level.
44. The Applicant’s acknowledgment that the Reservation was not limited to metals in their native state was important. It meant that neither side was suggesting that “other metals” meant metals in their native state.
45. The Applicant’s case in its skeleton argument was that “other metals” only captured metalliferous minerals (or metallic ores) extracted to produce other metals with typical metallic qualities (such as tin, copper, lead etc). The Applicant submitted that rock salt and potash are only extracted in order to use the compound rather than for the purpose of producing the pure metals which are too reactive to be kept or used outside a laboratory. The Applicant further explained that the term “other metals” covered a mineral from which conventional metals in their pure or near pure form (also described as their native state) could be derived for economic use. They also submitted that it would depend on whether the metal in its pure or native state would have economic importance or display the qualities giving metal its economic importance, i.e. whether it is strong and workable etc.
46. The Applicant asked the court to find that in the vernacular of the mining, commercial and landholding world (whether now or in 1946) salt and potash are not regarded as metalliferous minerals. It argued that in the vernacular world, evaporite minerals such as rock salt or potash do not fall within metalliferous minerals. In opening the Applicant further explained its case submitting that “metals” meant metal ores or metalliferous minerals where the target mineral is a metal end-product as opposed to something which happens to have metal within its compound formation, and can only exist as a compound.

47. In closing submissions it submitted that the Reservation for “other metals” meant metalliferous minerals producing metals in a simple form, also described as everyday metals. The Reservation did not include minerals which are composed of metal compounds unavailable in nature in their pure or native state (i.e. where the metal does not ordinarily exist in its native state). The Applicant did not attempt to define everyday (or conventional) metals but it mentioned tin, copper and lead minerals as falling within the reservation and maintained that elemental potassium cannot be used as an everyday metal.
48. The Applicant argued that the wording should be given its meaning as a matter of common sense rather than as a matter of chemistry or the periodic table. A substance is not regarded as a metal just because it contains metallic elements (foods such as milk and bananas are not ‘metals’ even though they are important sources of calcium and potassium). Sodium and potassium display none of the metallic qualities for which metals are produced and traded and which gives them economic importance. In the vernacular of the mining, commercial and landholding world of 1946 salt would not be regarded as a metal or a metalliferous mineral. In the mining world metalliferous minerals are materials used to produce hard, malleable metals and the preceding words of the reservation establish that this is the conception of “other metals” being deployed.
49. Other common minerals contain metals (e.g. limestone which contains calcium) but it would be wrong to regard a limestone quarry as an example of metalliferous mining.
50. The Applicant also relied on canons of construction including *ejusdem generis* to support its main argument. It also alleged that potash and rock salt were not recognised as a commercially viable resource in the UK in 1946. These aspects are addressed below in more detail.

G The factual background against which the conveyance was made

51. The area of North Yorkshire surrounding the Parcels has a very rich history of mining and commercial activity, which has been carefully preserved. The

economic need for industrial resources also led to investigation of the geology of the area. The following findings largely reflect matters which were not in dispute.

Geological history

52. As Mrs Iwanicki explained, the main solid geology of this part of North Yorkshire is a succession of sedimentary rocks formed during the Permian period around 225-300 million years ago. These rocks are predominantly evaporites (also called salts) formed by the evaporation of a vast ocean stretching from Yorkshire to Poland. These evaporites were formed first and are at great depth. Above the evaporites are much younger sedimentary rocks including sandstones and mudstones deposited in the Jurassic period, some 180-190 million years ago. Over time these deposits became saturated with iron-rich fluids at depth. This series of sedimentary rocks includes the Cleveland ironstone beds (described in geological terms as forming part of the Middle Lias). The main ironstone seams lie at depths of 36-42m below ground level.
53. This broad geological history of the area (including the presence of salt deposits) would have been known in the mining and commercial world in 1946 as shown by the materials relied on by Dr Alexander Fleck, (who later become Baron Fleck and chairman of ICI) in a lecture entitled "*Deposits of Potassium Salts in North East Yorkshire*" given in Newcastle on 17 October 1950 to the Newcastle section of the Society of Chemical Industry (also published with the same date in a 15 page article in a publication called Chemistry and Industry).

The rise and fall of mining by the Palmers

54. Mining activity in the wider area of the Parcels goes far back. There was a huge expansion of mining in Victorian times alongside significant industrial activity in the area including railways, ironworks, steel mills, shipping and shipbuilding.
55. The First Respondent's ancestors were successful industrialists who established the Palmer shipyard at Jarrow. They had complementary interests in coal, iron, shipping and shipbuilding, and connections with four local ironstone mines, including Staithes Mine and Port Mulgrave Mine in the second half of the 19th century. They opened the Grinkle Park Ironstone Mine in 1872 (following

purchase of the Grinkle Park Estate in the 1860s) and it remained in production until 1930. The nearby Boulby Mine was also owned and operated by the Palmers between 1903 and 1934.

56. The Cleveland ironstone boom ended in around 1875 with the advent of steel for which it was initially an unsuitable raw material. Ironworks then became accustomed to using other iron ores. Mining of ironstone in the area declined after World War 1 as economically workable seams were exhausted and the last mine closed in 1964.
57. ICI had started manufacturing fertilisers at its plant in Billingham in the 1920s using anhydrite (an evaporite mineral) mined near the plant. It came to be one of the most significant industrial businesses in Teesside. Mr Sandbrook also refers to the founding of the British alkali industry in the area in around 1797.
58. In the 1920s some lands were sold off by the Palmer family and those conveyances excepted and reserved *“the mines beds and quarries of ironstone and iron ore and other metals coal and other minerals”*.
59. Mr Mark Palmer inherited what remained of the Grinkle Park Estate in 1933. He sold the Estate by way of auction on 26 September 1946. The printed auction particulars contained a notice of the main items, general remarks and the conditions of sale. These conditions of sale contained at condition 10 the wording set out above that was the Reservation in the conveyance now being construed. The general remarks stated:

“MINERALS. All minerals lying under the Estate are reserved to the Vendor. See Condition of Sale No.10 as to this.”
60. Coal was not referred to in the particulars, conditions of sale or conveyances. Ms Iwanicki suggested that the probable reason for this was that the ownership of coal was nationalised under the Coal Act 1938 and thereafter a reservation of coal would have been of limited use.

Presence of potassium salts

61. As for potash, the experts agreed that the presence of soluble potassium salts was first discovered in North Yorkshire near Aislaby in Eskdale, near Whitby (approximately 8.5 miles from the Boulby Mine) in 1938 and 1939 by the D'Arcy Exploration Company (owned by Anglo-Iranian Oil Co, a forerunner of British Petroleum). At that time, when war was already feared, this company entered a programme of petroleum prospecting in the UK and it sunk a deep exploratory borehole near Aislaby down to around 1500m. This was a significant exploration exercise (alongside other boreholes sunk around the UK) and, as Mrs Iwanicki commented, was probably the deepest drilling ever seen in the UK at the time.
62. ICI was involved in the Aislaby boring exercise in 1938-1939, and conducted chemical analysis of the cores drilled, as recounted by Dr Fleck in his 1950 article. Dr Fleck reports that ICI's analysis of the material bored out revealed the presence of potash in all three of the Permian salt beds discovered. He provides a description of the Aislaby boring and the findings on the chemical analyses that were published by the Chief Geologist of Anglo-Iranian Oil, Dr GM Lees, and Mr AH Taitt (named by Dr Fleck as a consultant at ICI) in an article published in the Quarterly Journal of the Geological Society in 1945 under the title, *The Geological Results of the Search for Oil Fields in Great Britain*.
63. Dr Fleck provided a summary of the findings of Lees and Tait, explaining that polyhalite was found in the 1939 borehole (in substantial quantity in a bed of some 45 ft), and sylvinite, sylvite and halite were also located. He also reproduces the diagrammatic log of the Aislaby boring published by Lees and Tait in 1945. There was a dispute as to the weight of evidence of the Lees and Tait article.
64. Mr Sandbrook gave evidence of the importance of potassium for the UK economy in 1946 (as supported by Dr Fleck's article) and that the main commercial source of potassium at that time was potash in evaporite beds. He refers to longstanding interest in potassium and potash prior to 1946 (again supported by Dr Fleck's article), noting that German mines were the main European source for potash and

that the UK had to depend on imports of potash from Russia and north America during the Second World War.

65. Dr Fleck refers to ICI's keen and longstanding interest in potash before, during and after the Second World War. He refers to earlier pre-war attempts by ICI to overcome the scarceness of potassium in Britain, and the significance of having an indigenous source of potassium. Mrs Iwanicki acknowledged that the discovery of polyhalite in the Aislaby boring in 1939 was of potential commercial importance.
66. Dr Fleck reported that in 1943 ICI informed the British ministry of supply of the discovery of polyhalites in the Aislaby boring. At that stage the Government decided that even if boring gave favourable results, investigations should be shelved until after the war. The Applicant contended that this communication would have been confidential.

H Developments since the conveyance was made

67. ICI lacked the expertise to reach the depth of the potash deposits identified in Aislaby (which were more than 1000 metres beneath the ground) but it remained motivated to find further local supplies of resources for its fertiliser products. In late 1947 there were discussions between ICI and the Mineral Development Committee of the Ministry of Fuel and Power. Dr Fleck reported that ICI undertook further explorations with additional boreholes in 1948-49 because it was possible that potassium chloride could be economically extracted from brine. Dr Fleck publicised the results in his lecture.
68. ICI then trialled the possibility of solution mining for potash in 1952-54. This was not a success but further investigations were undertaken in the 1960s with 15 further boreholes drilled between 1965 and 1968. Confirmation that potash existed within the former Grinkle Park Estate was obtained by way of a borehole drilled in 1966. Planning permission for mining potash was obtained in 1968.
69. The Claimant was formed when ICI joined forces with Charter Consolidated Ltd in 1967 (and its parent company is now Israeli Chemicals Limited).

70. There was a dispute over ownership of mining rights in the 1960s when mining was under consideration. The Applicant initially dealt exclusively with the late Mr Palmer but the Second Respondent's predecessor in title, Hope and Anchor Breweries Ltd, issued High Court proceedings in 1969 against both Mr Palmer and the Applicant asserting that it owned the potash. These proceedings were compromised in accordance with Heads of Agreement dated 5 August 1970 under which Mr Palmer and all the relevant surface owners of the former Grinkle Park Estate subsequently entered into joint leases with the Applicant.
71. The Applicant started commercial production of potash (and halite) in 1973 and later acquired the freehold of the Parcels.
72. The compromise of the proceedings in 1970 allowed the Applicant to proceed with mining potash but did not determine the issue as to the meaning of the Reservation. The leases concluded in 1970 expired in June 2020 but the Applicant is holding over. Mining continues but these proceedings were issued to resolve the basis for any compensation to the Respondents.

I Discussion on the proper construction of the Reservation

73. Neither side put forward a position on the burden of proof. On a preliminary issue on the proper construction of a contract that question may not arise. However, there were factual issues in dispute and the court was being asked to decide whether the rock salt and potash on the onshore areas were reserved. The Applicant is seeking declaratory relief but I also take into account that the First Respondent is claiming to fall within an exception. Slade J in *Lonsdale* (see p921) suggested that a defender must establish that it has the benefit of the Reservation. Accordingly, if relevant, I assume the burden of proof lies on the First Respondent to establish that potash and salt fall within the reservation in her favour.

I.1 Discussion of the evidence

74. The Applicant mainly relied on Ms Iwanicki's opinions summarised as follows:
 - a) Potash and rock salt do not display the qualities that define metals and would not, in modern terms, be considered metals in the vernacular of the mining and commercial world.

- b) Geologists, mineral surveyors and mining professionals concern themselves with minerals and rocks that are found in nature and which can be extracted from nature, and not with elements that are created in laboratory conditions.
- c) Potassium and sodium minerals are compounds and are not thought of or talked about as metals by the geological or mining community. The reference to “*other metals*” and the working powers and other rights referred to in the 1946 Reservation were directly associated with the earlier references to ironstone and iron ore, and could mean the shales worked during the extraction of the ironstones or any other metals that could be recovered from the ironstones during the smelting process. This reflected her evidence that “metal” was a mining term for shale in the north east of England.
- d) If the term “*other metals*” were to be considered in the broadest UK mining context to mean metals other than iron, it would only capture gold, silver, manganese, copper lead, zinc, tin, tungsten, arsenic and antimony (i.e. metals that are generally understood by geologists and the mining community to have typical defining qualities of metal and are commonly recognised as mined commodities).
- e) The potash within the Parcels was not investigated by boreholes until the 1960s and its potential as a commercially viable mineral resource had not been identified in 1946.
- f) The rock salt underlying the Parcels could not be commercially mined at this depth in 1946 and was only extracted at Boulby Mine as a by-product of potash.
- g) None of the literature reviewed refers to either potash or rock salt as metals and neither would have been referred to or thought of as metals in 1946 by landowners, mining companies or the local community.
- h) The rock salt at Boulby was not recognised as a commercial mineral resource in 1946.
- i) The business interests of the Palmer family were centred in and around iron production, ship building and shipping and the procurement of mined resources needed to fuel those endeavours (i.e. iron ore and coal). They acquired the North Yorkshire estates for its ironstone resources and the Reservation reflects the family’s established mining interests and its requirement for iron ore, the proven local geology and the mining history of the local area.
- j) Potash was not recognised as a commercially viable mineral resource in the UK in 1946. It was not until the 1960s that its potential to be mined was understood as evidenced by the exploratory activity and submission of planning applications during that decade.

75. The Applicant relied on the Shorter Oxford English Dictionary from 1908 and also that from 1944 which provides as follows:

“Any member of the class of substances represented by gold, silver, copper, iron, lead, and tin, and orig. confined to these bodies together with certain alloys. In Chem. the ‘metals’ are a division of the ‘elements’ or simple substances. Of these some possess all the properties, such as high specific gravity and density, fusibility, malleability, etc. formerly viewed as characteristic of a metal, whilst others possess hardly any of them, the metallic lustre being perhaps the most constant. In pop. lang. not applied when the identity of the element is disguised in combination.”

76. The Applicant’s counsel suggested that I address the literature (including Dr Fleck’s article) forensically. They put significant emphasis on Mineral Planning Factsheets (“MPF”) that were published on various dates in the 2000s and 2010s by the British Geological Society (“BGS”) and the Office of the Deputy Prime Minister on economically important industrial minerals extracted in England. The Applicant asked Mrs Iwanicki to comment on these MPFs.
77. The MPFs provided a useful summary of mining activity and had some relevance.
- a) The MPF on Miscellaneous Minerals (2004) includes headings for hydrated magnesium silicate (also known as talc) and iron ore which it describes as no longer being economically viable. It has a heading for “other metal ores”. It notes that while Britain may have been a leading producer of iron, tin, copper and lead in the 19th century (and also produced other metals such as zinc, arsenic, tungsten, silver and gold) the industry had declined such that the only metalliferous mineral now extracted is lead ore, derived as a by-product of processing fluorspar (calcium fluoride).
 - b) The MPF on Metals (2015) contains a similar historical account of the rise and decline in the extraction and production of metals in Britain. It explains that metalliferous minerals are extracted primarily for their metal content but exceptions include bauxite and ilmenite. It refers to the properties of metals which are of economic importance (either singly or in combination) as being strength, hardness, thermal and electrical conductivity, workability, corrosion resistance and lightness. It has a section on markets, supply, production and trading with a map containing areas of existing prospects, historic mining, smelting and steel mills. It

comments that domestic metal extraction is restricted to three active mines, one for gold, another for lead sulfide, and one where tungsten concentrate was extracted. It also mentions other areas with prospects including for tin, gold, silver, copper, lead, barytes, chromium, tungsten, platinum group, zinc and nickel). Boulby, potash and rock salt are not mentioned.

- c) Salt and potash each have their own specific MPFs (published in 2006 and 2011). The potash MPF states that potassium is a primary nutrient essential for plant growth.

- 78. The Applicant emphasised that neither the Miscellaneous MPF nor the MPF for Metals list sodium or potassium, nor do they mention salt and potash, or describe either as a metalliferous mineral. It relied on Mrs Iwanicki's comment that the fact that these MPFs do not refer to potassium or sodium suggests that these elements are not treated as mined commodities. It argued that the fact salt and potash have their own MPF is precisely because they are not metalliferous minerals. However, these points had limited weight. There was no MPF for metalliferous minerals or metallic ores, or for metals such as iron, copper, lead or tin, mainly because there is no significant economic production of minerals containing these metals.
- 79. The MPFs on Metals and Miscellaneous Minerals provided some support for the Applicant's case on the meaning of metalliferous metals. However, they were largely about historical context and providing a miscellaneous round-up. The MPFs state that their purpose is primarily to inform the land-use planning process. Neither expert suggested that they were regarded as benchmark publications in the mining or commercial world, or that they were an authoritative source of terminology or vernacular usage. They could not be treated as firm evidence of the vernacular meaning of metals, metallic ores or metalliferous minerals.
- 80. Mrs Iwanicki relied on the fact that the London Metal Exchange website and the website of the Minor Metals Trade Association refer to metals commercially traded on global markets but do not include sodium or potassium. This is relevant

as to markets for international trading but of more limited weight in understanding the use of the term “metal” in a mining context, especially as there was no evidence that similar information would have been available in 1946.

81. It was also not conclusive since Mrs Iwanicki referred to lithium as a metal, and noted that lithium compounds are listed on the London Metal Exchange. She acknowledged that lithium is a metal in demand but it is only used commercially in the form of compounds. This reflected the position of potassium, which she also acknowledged was an essential nutrient for plants. This all suggested that the commercial and mining world treats lithium and potassium as mined metallic commodities, even though they do not exist ordinarily in their native state and do not have the typical metallic qualities of being hard and unreactive.
82. Mrs Iwanicki pointed out that the modern classification for minerals commonly splits them into hydrocarbons, metals and industrial or construction minerals (including gypsum, potash, salt and sand among others). She acknowledged that there was no evidence that this classification (i.e. potash or salt as industrial minerals) would have applied in 1946.
83. *Lonsdale* suggests that in 1946 this modern classification would not have been vernacular usage. As regards mining, the main distinction would have been between coal mines and other mines. Slade J refers to the Metalliferous Mines Regulation Act 1872 which related to the inspection and regulation of mines other than those to which the Coal Mines Regulation Act applied. The Metalliferous Mines Regulations Act covered miners’ welfare in mines other than coal mines. Accordingly, contrary to one of the Applicant’s arguments, in the mining world of 1946 a gypsum mine would have been treated as a metalliferous mine as regards miners’ welfare.
84. There was some evidence of a modern classification between metallic minerals, and industrial or construction minerals. However, there was limited evidence to support an understanding that metalliferous minerals only covered minerals from which “everyday” metals are extracted (or that would have been usage in 1946). This approach would have ruled out all minerals that contained the reactive alkali

or alkaline metals (i.e. including any compound of sodium, potassium, lithium, calcium, barium or magnesium). The literature and expert evidence did not support a finding of such a usage.

- a) While the MPF on Metals suggested that metalliferous minerals are ones from which metal are extracted, it acknowledged that this approach was subject to material exceptions.
- b) *Exploration for Metalliferous and Related Minerals in Britain* published by the British Government and the British Geological Survey in 2000 was a publication relied on by Mrs Iwanicki. It included potash and the Boulby mine in a map of metalliferous and related minerals.
- c) A useful historical book called *The Mines of Yorkshire, Metalliferous and Associated Minerals* (published in 2003) was also relied on by Mrs Iwanicki. It suggested that historical records of mining for metalliferous and related minerals would not have included evaporite production (including rock salt) or limestone quarrying. However, they did include the mining of minerals such as baryte and fluorspar. These are minerals which are extracted for the purpose of extracting compounds containing barium and calcium which are reactive metals, and not for the extraction of an “everyday” hard metal.
- d) Both experts sometimes referred to evaporite minerals as metallic salts.

85. The literature also provided little support for Mr Sandbrook’s view that potash and salt would be considered metals as a matter of vernacular usage.

Further factual findings on relevant surrounding circumstances

86. The objective purpose of the Reservation was to reserve interests in mining on the land being conveyed. The dispute is as to which interests were reserved, and whether they extended to the potash and rock salt under that land. The intended purpose is apparent from both the wording and context of the Reservation. The late Mr Mark Palmer came from a family that had decades of business experience and significant ownership of mines. The conveyances essentially involved the sale of farm land that may have been formerly mined. Given the well-known terminal

decline of the ironstone mines it was unlikely that the sole object of the Reservation was to preserve rights to mine ironstone or iron ore.

87. There was an issue as to the admissibility and weight of the general remarks in the auction particulars. The Applicant suggested that they were irrelevant prior negotiations, referring to the Supreme Court in *Cusack v Harrow LBC* [2013] UKSC 40 and that estate agents' comments were not reliable, whereas the Respondent suggested that they were a relevant part of the overall factual matrix as to what the parties understood was being sold.
88. The auction particulars did not amount to inadmissible pre-contractual negotiations. They constituted a statement made on behalf of the vendor to all potential purchasers as to what was being sold. While the terms of clause 10 prevail as terms of the sale (and conveyance), the particulars were part of the commonly known basis upon which the land was sold. They provide extrinsic evidence to assist in identifying what the parties reasonably understood was being conveyed or reserved. Any reasonable person reading the particulars would have understood that the sale was subject to a wide reservation covering rights to mine all minerals, and read clause 10 in light of that. This understanding reflected the context of a sale of farm land in this area where the Palmers had significant commercial and mining interests, and where the reservation expressly covered both underground and open mining.

Knowledge of whether potash and salt could be commercially exploited

89. There was a dispute as to the date by which the mining, commercial and landowning world would have recognised that the North Yorkshire potash beds could be commercially exploited for the purpose of profit. While the Applicant appeared to acknowledge that potential was recognised by late 1950 (following Dr Fleck's article) it maintained that such potential would not have been recognised in 1946, suggesting that nothing had happened following the discovery until late 1947.

90. However, this part of the Applicant's case did not reflect the evidence as to what would have been recognised by the mining, commercial or landowning world. Those worlds would reasonably have known the following matters in 1946.
- a) Potash was a commercially viable mineral resource that was worth mining because potassium is an essential nutrient for plant growth. Dr Fleck's article refers to this, and the experts and MPFs also acknowledge it. The fact that it had not been mined in Great Britain in 1946 did not mean that it was not a commercially viable mineral resource of interest to the mining world. I prefer Mr Sandbrook's evidence on this.
 - b) Potash was sought after and had to be imported from foreign mines (of which there were a limited number, mainly in Germany, Russia and north America). Its economic importance was heightened because of the need for food security following the war (as reflected by Dr Fleck's article).
 - c) The presences of salt deposits in the area were known (as shown by the presence of anhydrites in Billingham and Dr Fleck's reference to these having been of interest to ICI and studied since the 1880s), although I accept Mrs Iwanicki's evidence that there was no evidence of outcropping of the beds of evaporites in this area.
 - d) Halite was a commercially viable mineral resource that was extracted for the purpose of profit. Its ubiquity meant it would be of much less commercial interest than potash as a resource to mine. Taken by itself, halite would not have been commercially mined at the depths found (i.e. over 1000m) but alongside potash it could be an economic by-product.
91. At that time anyone in the commercial, mining or landowning world in this part of the North East of England would have been aware of exploration by boreholes made by D'Arcy Exploration Company around 1938-1939, including the borehole in Aislaby and the overall outcome of that exploration.
- a) Exploration of hydrocarbons in Britain would have been of intense interest to these worlds (whether in the North East or otherwise). The mining world was trying to identify sources of hydrocarbons in circumstances where the

UK did not have its own oil or gas. This was evidenced by the prospecting programme being carried out for such resources around the UK and at Aislaby which involved the deepest drilling ever encountered in the UK. The borehole in Aislaby was a significant commercial project.

- b) Hydrocarbons had not been located in significant quantities. However, as Mrs Iwanicki acknowledged, the finding of a substantial quantity of polyhalite and other sources of potash was of potential commercial importance, as also evidenced by Dr Fleck's reports of ICI's interest.
 - c) The findings from the borehole in Aislaby were published in 1945 in a geological journal. This was an academic journal but the findings were not merely of academic interest and would have been of interest to the commercial, mining and landowning world in that area:
 - i) The findings related to the search for oil fields and the presence of potash in this part of the North East. Both were matters of significant commercial interest to these worlds due to their importance and value, and the lack of indigenous sources.
 - ii) The authors were employed by ICI and a large oil company (a forerunner of BP).
 - iii) While matters arising after the conveyance would not have been known at the time, the consequences of the published findings throw light on their significance at the time of publication.
92. ICI considered that the results relating to potassium minerals merited a report to the Government in 1943. These communications may not have been in the public domain but this was of somewhat limited relevance as to the state of knowledge from September 1946 since the findings made by ICI and BP's forerunner were in the public domain from 1945.
93. The results also justified significant further exploratory measures being taken by ICI after the war ended (in 1948 to 1950) which resulted in extraction of potassium

minerals in 1952-1954. This led to later exploration in the 1960s leading to mining of potash that has taken place since 1973.

94. In 1946 people in the mining, commercial or landowning world in the area would not have known that potash and salt could be commercially exploited under the Parcels. The results did not relate to that land (although they related to land close by) and were not conclusive as to economic exploitation. However, the possibility of such extraction would have occurred to a person in the mining, landowning or commercial world interested in buying or selling land in that area. They would have known that significant modern exploratory drilling for hydrocarbons had taken place in the area, and while oil had not been reported a substantial quantity of polyhalite had been located, together with the presence of other forms of potash.
95. Overall, I prefer the Respondent's case that potash was recognised by the mining, commercial and landowning world as a commercially viable mineral resource in 1946, and the possibility for extraction in this area was known by people in those worlds in this part of the North East.

Factual findings on vernacular usage

96. Having reviewed the evidence I conclude that there is no direct evidence of a vernacular meaning or usage for the term "other metals", or the wording, "*the mines beds and quarries of ironstone and iron ore and other metals*".
- a) The experts agreed that the term "other metals" was not a definite term and it was open to interpretation. This in itself may not provide a decisive negative answer to the question as to whether the disputed wording has a vernacular usage or meaning but it suggested there was no clear usage.
- b) The wording of the Reservation was not standard. Neither expert gave evidence of having encountered it outside the context of the late Mr Mark Palmer selling his estate (the Applicant had found another Mark Palmer 1964 contract of sale of another piece of nearby land with similar wording). This was a further indication that it was unlikely that there was a vernacular usage for it.

- c) In the authorities the word “metals” sometimes appears in a reservation alongside minerals (and sometimes with other general terms such as ores alongside). The Applicant did not dispute that potash and salt would, in principle, have been included if the Reservation listed minerals, subject to being recognised as commercially extracted in the UK.
 - d) Mrs Iwanicki frankly acknowledged that she did not find it clear what the drafter meant by inserting “other metals” but thought it was probably an attempt at drafting flair. This further suggested there was no vernacular usage for the term.
 - e) The parties put forward a great deal of evidence as to the wording’s vernacular meaning today (and also in 1946) including books, dictionaries, government publications. As explained above, the evidence showed that there was no clear vernacular usage for the term “metalliferous mines”, “metalliferous minerals” (or metallic minerals or metallic ores).
97. The dictionary meaning given to “metal” suggested that it meant metallic elements and alloys of such elements. However, the dictionary meaning was not decisive in identifying the meaning of “other metals” since it was common ground that the term in the Reservation was not a reference to metallic elements and alloys in their native state.
98. For similar reasons the Applicant’s reliance on literature and Mrs Iwanicki’s evidence suggesting that potash and rock salt (or other minerals that are compounds of sodium potassium) were not treated in the vernacular as “metals” was of limited weight. On the Applicant’s own case the phrase “other metals” in the Reservation did not mean metals in their native state.
99. On the Applicant’s case minerals which are compounds containing tin, copper or lead would fall within the Reservation wording of “other metals”. The vernacular literature relied on by the Applicant did not treat those minerals as metals either, or suggest that they had the qualities that define metals. In this respect the evidence relied on supported neither side’s case. It only suggested that a vernacular meaning for “metals” was metallic elements (or alloys as mixtures of

metallic elements) in their native state and neither side was putting forward this construction.

100. Mrs Iwanicki's evidence was that the word metal meant a solid material which is typically hard, shiny, malleable, fusible and ductile with good electrical and thermal conductivity (and was also a mining term for shale used in the north east). The primary definition would reflect ordinary understanding of the main typical qualities of a metal.
101. However, this definition was obviously not exhaustive for the mining and commercial world, or more generally. Both experts agreed that sodium and potassium are metals even though they are reactive. This was agreed evidence as to the application of the word "metal". It was not technical scientific evidence of a chemist. It came from mineral surveyors taking an expert view of the language of the mining, commercial and landowning world. This evidence would reflect ordinary understanding and application of the word "metal" as relating to metallic elements (as also supported by the dictionary meaning relied on by the Applicant) and I prefer that agreed evidence.
102. An ordinary person (and especially those from the mining, commercial and landowning world) would agree with that evidence. They would know that there are many metals, and not every metal has the typical metallic qualities listed by Mrs Iwanicki (again as supported by the dictionary meaning).

I.2 Canons of construction

103. The Applicant submitted that although the list of materials before "other metals" is short (i.e. "ironstone and iron ore") the principle of *ejusdem generis* applied and these terms provide a guide as to how "other metals" is to be construed. Since ironstone and iron ore are extracted in order to produce pig iron and steel, "other metals" should be construed similarly, i.e. by reference to raw materials which are extracted in order to produce pure or near pure metals which have the typical metallic qualities, i.e. hardness, ductility, and ability to conduct heat and electricity and so on.

104. It submitted that the separate canon that “meaning is known by context” serves much the same purpose and suggests that “other metals” falls to be construed having regard to the fact that it is prefaced by “ironstone and iron ore”. Rock salt and potash are only extracted in order to use the compound rather than as feedstock for producing a pure metal.
105. It is accepted that the meaning of the Reservation will be known by context and the earlier parts of the clause may colour the meaning of the later terms. To that extent these canons of constructions were useful pointers within the ordinary approach to construction. The parties’ objective intention was to extend the scope of the reservation beyond the mining of iron ore and ironstone. This reflected the choice of an additional head of reservation, and the use of a wide term “other metals” that would not ordinarily describe an iron ore or iron. However, the principle *ejusdem generis* provided limited additional assistance and did not support the Applicant’s case.
106. The Applicant also relied on the canon of construction *contra proferentum*. It suggested that there are two variants of the rule, first construing against the party who has put forward a clause and secondly construing against the party who benefits from a clause. It submitted that it could invoke both variants in this case. However, it correctly acknowledged that this principle is only to be applied where there remains genuine doubt having applied the other principles of interpretation. It also correctly referred to Lord Neuberger’s reference to this doctrine as being “very much a last refuge” in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No. 1 Plc* [2016] UKSC 29 at [53]. Here it was not necessary to resort to the principle of construction *contra proferentum* since the ordinary rules of interpretation were sufficient to understand what the parties meant.
107. Finally, the Applicant argued that the First Respondent was trying to argue that the reservation was for minerals and this did not reflect the wording. If Mr Palmer had wanted to have a wider reservation or to have included non-metalliferous minerals he could easily have used the words “other minerals” but he made a deliberate choice not to do so. In this respect it relied on the existence of earlier

conveyances made by his father in the 1920s which included the term “other minerals” and a contract of sale he made in around 1964 which had crossed this term out.

108. The conveyances were separate transactions decades earlier than the 1964 contract. There was no suggestion that the conveyances were on a standard form or that words in them had been deleted. For similar reasons the earlier contracts from the 1920s had limited weight as aids to construction. The better approach was to construe the words the parties had chosen.

I.3 Conclusions on meaning of the Reservation and its application

109. There was no conclusive evidence as to vernacular usage (whether applied today or in 1946). This makes it necessary to draw inferences and construe the wording of the conveyance in light of the surrounding circumstances and taking account of the relevant principles of construction set out above.
110. The wording reserving “other metals” was ambiguous and open to several meanings which are summarised below.
- a) It did not mean other metallic elements or alloys in their native state. Neither side put forward this case.
 - b) It did not mean any substance containing metal or that could be a source of metal. Neither side suggested as much. Clearly such a broad approach would not have reflected the parties’ purpose in reserving mining rights. The express use of the word “mineral” several times elsewhere in the Reservation showed that the parties understood they were making an agreement about minerals. The Reservation only covered minerals, and the dispute was as to which minerals were reserved. The Applicant’s argument as to the absurdity of the Reservation covering bananas or milk does not arise.
 - c) It did not mean shale worked during the extraction of ironstone even though Mrs Iwanicki’s evidence was that this was a term used by local miners to describe shale. There was no evidence that metal would have

been understood in the wider commercial or landowning world as meaning shale.

d) Similarly, it did not mean metals other than iron that could be extracted from ironstone because the wording suggested a broader scope than merely reserving iron ores or ironstone. Mrs Iwanicki was unaware of other such metals that could be extracted. The well-known ending of ironstone mining on these lands also meant it was unlikely that this was its sole purpose.

111. The remaining potential meanings were those put forward by the parties. The question to be decided was whether the ambiguity in the wording “other metals” should be resolved to construe “other metals” as restricted to metalliferous minerals from which everyday metals, or metals in a simple form, are extracted (the Applicant’s case), or whether it covered all minerals which are a source of metal, or yield a metal of particular utility (the Respondent’s case). Both sides’ case still begged the question as to the meaning of “metal”. However, it was notable that at that point both sides were referring to metallic elements.
112. The Applicant used various ways to identify the distinguishing features for its case on the meaning of “other metals”, including “conventional”, “everyday”, “simple form”, “typical metallic qualities”. While these distinguishing features might be applied very easily to identify iron (and its alloys such as steel) they were not found in the literature relied upon. There was no evidence of their vernacular use in identifying metals more generally. Indeed, in her evidence Mrs Iwanicki had referred to the minor metals trade association and she had not categorised metals as “everyday”; she had described everyday uses of metals.
113. The Applicant’s case was effectively that the wording meant “ironstone, iron ore and other metalliferous (or metallic) ores from which everyday metals can be extracted”. This construction depended upon the parties having a common objective understanding of the meaning of metalliferous (or metallic) ores, and also what would be understood by “everyday” metals (or metals in a simple form). This understanding was not supported by the literature or the wording of the

Reservation. It still left open a difficult question as to what an everyday metal would be. It ignored Mrs Iwanicki's uncontroversial evidence that potassium was a metallic element which is an essential constituent of plant and animal life. It also ignored the fact that sodium and potassium (and other reactive metals such as lithium, calcium or magnesium) are regarded as metals in everyday language including in the commercial and mining world.

114. As explained above, the evidence of the surrounding facts and vernacular understanding of the mining, commercial or landowner's world (in 1946 and today) did not support the Applicant's restrictive approach. The Applicant's construction of the clause was complex and changed throughout the hearing. It depended on distinctions that were not clear from the evidence. Its construction was also inconsistent with the more likely purpose of the clause (to provide a general reservation of mining rights) and its simple language.
115. The experts agreed that the reserved working rights (i.e. for the right to sink shafts and pits) reflected local mining practices seen at the time when the Parcels were sold in 1946. Mrs Iwanicki accepted that the wording was a wide one and would cover many types of mining. Slade J in *Lonsdale* found that pointers as to the meaning of a phrase may be derived from the express powers of working that are conferred. Here, unlike in *Lonsdale*, the Reservation allowed drilling, mining or quarrying on the surface of the land. This express wording was more consistent with the Respondent's case. It suggested that the Reservation should be construed broadly as a wide reservation agreed between a vendor with long business experience of mining and a purchaser buying farm land without the intention of mining.
116. Taking account of the language used throughout the Reservation and the evidence of the factual context, the wording in question reserved ironstone, iron ore and other minerals which are a source of metal. The meaning of metal in that context would mean a metallic element in any form. This construction makes sense of the wording of the Reservation (which referred to metals and also minerals), the

accepted expert evidence, the literature on vernacular language and the context against which the conveyances were concluded.

J Do potash and salt fall within the Reservation?

117. Both potash and salt are a source of metal. However, a threshold question arose as to whether potash or rock salt would fall outside the reservation because they are not minerals within the vernacular meaning of that term. Existing case law means that minerals in this context do not include every substance that may be extracted from land. It covers substances that are exceptional in use, in value and character (*Waring v Foden*).
118. The Applicant relied on the treatment of limestone and gypsum by the literature and also by Mr Sandbrook as not being metallic ores. However, this was of limited weight in addressing the separate question as to whether potash and rock salt fell within the reservation. If anything, the varying treatment of different minerals highlighted the absence of any vernacular classification of minerals according to metal content. Limestone is not an evaporite mineral and back in 1855 it was not treated as a mineral in *Darvill v Roper*; in a similar way mudstone fell outside a reservation in *Wynne-Finch* as its use was not exceptional.
119. Potash is undoubtedly exceptional in value and use. As explained above, it was also recognised by the mining, commercial and landowning world in 1946 that it could be extracted commercially for the purpose of profit.

Is there a different conclusion for rock salt?

120. Rock salt is much less exceptional than potash and less valued for its metal content. The Applicant rightly acknowledged that it could be commercially extracted as a by-product and it was of sufficient value to count as a mineral. The MPFs and Dr Fleck's article show that salt is a mineral resource commercially extracted in England (and elsewhere) and it had important industrial uses quite apart from its use on roads, both now and in 1946. Given the ubiquity of salt its main commercial use is for de-icing roads. Its industrial uses as a sodium

compound are of very much less economic importance than those of potassium or lithium but remain of commercial interest.

121. While the rock salt present at Boulby at depths of 1000m would not have been commercially profitable for extraction on its own, the relevant test is not whether the mineral can be extracted at a profit (which may depend on market values and long term developments), but whether it is extracted for the purpose of profit. Here, the extraction of rock salt as a byproduct was of potentially worthwhile at the depths involved, and more generally it was commercially extracted as a resource as at 1946. Both potash and salt would accordingly count as minerals.

K Conclusions

122. For reasons set out above:
 - a) There is no direct evidence of a vernacular meaning or usage for the term “other metals”, or the wording, “*the mines beds and quarries of ironstone and iron ore and other metals*”.
 - b) The terms “other metals” in the Reservation is ambiguous and open to several meanings.
 - c) The vernacular understanding and context at the time of the conveyances pointed towards the First Respondent’s construction but not that of the Applicant.
 - d) The remarks on minerals in the auction particulars were relevant extrinsic evidence as to the intended effect of the sale (and the subsequent conveyances intended). Together with the surrounding context they suggested that the parties’ objective intention was that the sale was subject to a wide reservation for all minerals. This further suggested that the ambiguity in the wording should be resolved in favour of the First Respondent’s case.
 - e) The principles of construction *contra proferentem* and *eiusdem generis* did not justify the Applicant’s construction.

f) The meaning and effect of the Reservation was to reserve (and except) ironstone, iron ore and other minerals which are a source of metallic elements.

g) Potash and salt are minerals which are a source of metallic elements.

123. For all these reasons, the Reservation covers potash and rock salt on its proper construction. The First Respondent owns, or has an interest in, the existing mines beds and quarries of potash and salt and related rights and easements in the onshore areas B, C, Q and V identified in the claim form.